SC85315

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IN THE MISSOURI SUPREME COURT

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JOHN W. HAMMOND,
APPELLANT,

vs.

MUNICIPAL CORRECTION INSTITUTION,
RESPONDENT.

CASE NO. 00CV214729
WD61438

_____

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
DIVISION NO. 15
HONORABLE PRESTON DEAN, CIRCUIT JUDGE

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RESPONDENT'S SUBSTITUTE BRIEF

_____

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II. JURISDICTIONAL STATEMENT

The Respondent agrees with Appellant's jurisdictional statement.

III. STATEMENT OF FACTS

Appellant John Hammond (hereafter "Appellant") was employed as a Correctional Officer I at the Municipal Correction Institution[1], a subdivision of a department within the City of Kansas City, Missouri ("MCI") from approximately January 1997 through September 1999. (L.F. 0081, at par. 5, L.F. 0069 and L. F. 0074; L.F. 0093 at par. 8 g.; L.F. 0095 at par. 8.o). Appellant was terminated from his position on or about September 16, 1999. (L.F. 0081 at par. 5). Appellant alleged in his petition that he suffered discrimination on the basis of disability. (L.F. 0081, at par. 4; L.F. 0093 at par. 8. g.; L.F. 0095 at par 8.o).

On September 20, 1999, Appellant filed charge of discrimination number 281991058 with the Missouri Commission on Human Rights ("Commission") that formed the basis of the instant lawsuit. (L.F. 0097). Appellant's notice of right to sue for charge 281991058 from the Commission is dated March 21, 2000 and was attached to the original and amended petitions. (L.F. 0097 and L.F. 0086).

On June 20, 2000, Appellant filed his petition based on charge number 281991058 in the Circuit Court of Jackson County, Missouri for alleged an violation of his rights under the Missouri Human Rights Act ("MHRA"). (L.F. 0092, L.F. 0095 and L.F. 0097). On November 29, 2000, Appellant filed his First Amended Petition. (L.F. 0081). Both petitions named the "Municipal Correction Institute" (sic) as

[1]**Appellant refers to it as the Municipal Correction Institute.**

defendant. (L.F. 0092 and 0081).

At par. 16 of both petitions Appellant alleged, "Plaintiff timely filed his charges with the Commission and thereafter, received Notices of Right to Sue". (L.F. 0095 and L.F. 0084). Both petitions had a March 21, 2000 Notice of Right to Sue ("Notice") from the Commission attached. (LF. 0092 and 0097; L.F. 0092-97 and L.F. 0081-86). Neither petition alleged any claims based on race or age (L.F. 0092-97 and L.F. 0081-87), but only alleged discrimination on the basis of disability. Neither petition was based on Title VII. *Id*.

At par. 11of the First Amended Petition, Appellant alleged, "Plaintiff's employment file has been subsequently used to deny him commensurate employment. On or about September 5, 2000, Plaintiff received a right to sue letter regarding the issue of his employment file. A copy of that letter is attached hereto as Exhibit 2". (L.F. 0084). The attachment referenced at par. 11 is a right to sue notice from the Equal Employment Opportunity Commission ("EEOC") dated August 31, 2000 and it was attached to the First Amended Petition (L.F. 0087), but was not attached to the original petition. (L.F. 92-97). In all other respects, the Original and First Amended Petitions are identical. (L.F. 0092-97 and L.F. 0081-87).

On March 28, 2001, summons was issued against defendant "Municipal Correction Institute." (L.F. 0076).

On May 1, 2001, the MCI, through the City Attorney's Office, filed its Motion to Dismiss and Supporting Suggestions, asserting that Appellant failed to name a suable entity, that the MCI was not an employer as defined by the MHRA and the action was

barred by limitations because it was not brought within ninety days of the issuance of the notice from the Commission. (L.F. 0065-0066 and L.F. 0067-0075). On June 14, 2001, Appellant filed his Suggestions in Opposition (L.F. 0051-61) and a Motion to Amend Petition. (L.F. 0044-50). On June 25, 2001, MCI filed its Reply Suggestions in Support of its Motion to Dismiss. (L.F. 0040-43). On January 16, 2002, the Circuit Court granted the motion to dismiss based on limitations. (L.F. 0036-37).

On January 28, 2002, Appellant filed a Motion to Reconsider. (L.F. 0020-32). On January 31, 2002, MCI filed its Suggestions in Opposition to the Motion to Reconsider (L.F. 0015-19) and Motion for Entry of Judgment. (L.F. 0013-14). On May 16, 2002, the Circuit Court denied Appellant's Motion to Reconsider and entered judgment against Appellant. (L.F. 0012).

On May 24, 2002, Appellant filed his notice of appeal. (L.F. 0006-11). On March 28, 2003, the Western District Courts of Appeals affirmed the dismissal based on limitations. *Hammond v. Municipal Correction Institute*, 2003 Mo. App. LEXIS 451. On May 27, 2003, the Court of Appeals denied Appellant's application for transfer and motion for rehearing. *Id*.

On June 11, 2003, Appellant filed his application for transfer with this Court. The application raised only three issues:

1. **This case presents the Courts with the first opportunity to examine when claimants must file complaints under the Missouri Human Rights Act - whether the actions must be filed within ninety days of the date on the Notice of Right to Sue letter or within ninety days**

of receipt of the letter.

2. **This case presents the Courts with the first opportunity to examine how claimants should handle multiple right to sue letters for related acts. This is an issue of first impression in Missouri, although the Federal Courts, including the Eighth Circuit have ruled that a claimant may use the last right to sue letter where multiple letters have been issued, if the issues are all reasonably related.**

3. **This case presents the Court with the opportunity to resolve a conflict between the Court of Appeals, the Federal District Court and the Supreme Court regarding interpretation of RSMo 213.111.**

On July 1, 2003 Appellant's Application for Transfer was granted.

IV. POINTS RELIED ON

I. IN RESPONSE TO APPELLANT'S POINT I, THE CIRCUIT COURT COULD HAVE PROPERLY DISMISSED APPELLANT'S CASE FOR NAMING A NONSUABLE ENTITY AS DEFENDANT AND THIS COURT MAY AFFIRM THE DISMISSAL ON THAT BASIS.

***M.H. Siegfried Real Estate v. Independence*, 649 S.W.2d 893 (Mo. 1983)**

***Ozark Appraisal Serv. v. Neale*, 67 S.W.3d 759 (Mo. App. S.D. 2002)**

II. IN RESPONSE TO APPELLANT'S POINT II, THE CIRCUIT COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S CASE BASED ON LIMITATIONS IN THAT APPELLANT FAILED TO COMPLY WITH THE NINETY DAY FILING PERIOD UNDER THE MISSOURI HUMAN RIGHTS ACT.

***Gipson v. KAS Snacktime Co.*, 83 F.3d 225 (8th Cir. 1996)**

***Hill v. John Chezik Imports*, 797 S.W.2d 528 (Mo. App. E.D. 1990)**

***Conway v. Central County Emergency 911*, 1996 U.S. Dist. LEXIS 18931; 72 Fair Empl. Prac. Cas. (BNA) 322**

V. ARGUMENT

I. IN RESPONSE TO APPELLANT'S POINT I, THE CIRCUIT COURT COULD HAVE PROPERLY DISMISSED APPELLANT'S CASE FOR NAMING A NONSUABLE ENTITY AS DEFENDANT AND THIS COURT MAY AFFIRM THE DISMISSAL ON THAT BASIS.

1. INTRODUCTION

As a preliminary matter, the Circuit Court's dismissal of Appellant's case was based on limitations. (L.F. 0036-37). Additionally, the Court of Appeals decision was based on limitations. *Hammond v. Municipal Correction Institute*, 2003 Mo. App. LEXIS, 451. The Appellant's application for transfer filed with this Court is based on limitations.

In *Steinman v. Strobel*, 603 S.W.2d 18, 20 (Mo. App. W.D. 1980), the court discussed the issue of how claims of error may be abandoned and therefore waived on appeal. In *Steinman*, the Appellant raised only one issue before the Missouri Supreme Court and the case was remanded for consideration of that issue. When Appellant attempted to raise additional issues during the second round of appeals, the Appellant found that all other issues other than the one that was presented to the Supreme Court had been abandoned.

In this case, Appellant raised only issues concerning the commencement of the ninety day period to bring suit, what should occur when a plaintiff has more than one right to sue letter and an alleged conflict among the courts concerning the ninety day notice period. It is MCI's position that any review by this court is limited only to these issues. All other issues raised in Appellant's substitute brief should not be considered and stricken as they were not contained in his application for transfer to the Supreme Court.

In the event that this Court addresses the substance of these issues, the Respondent submits the following arguments.

B. STANDARD OF REVIEW

Respondent agrees with Appellant's standard of review.

3. THE CITY OF KANSAS CITY WAS NOT A PARTY TO THIS ACTION

Appellant asserts that his case was dismissed because he named MCI, a nonsuable entity, as defendant and/or the MCI is not an "employer" under the MHRA. A cursory examination of the order of dismissal (L.F. 36-37) reveals that the Circuit Court focused on the fact that Appellant's original petition was file stamped on June 20, 2000, rejecting Appellant's claim that it was actually filed on June 19, 2000. The Circuit Court found that the June 20, 2000 date was controlling and Appellant's claim of an earlier filing date would not be considered. (L.F. 36-37). The Circuit Court noted in its order the Appellant's concession that the notice of right to sue from the Commission, which was attached to his petition, is dated March 21, 2000 and this was ninety-one days before the file stamped date of June 20, 2000 (L.F. 36-37). It is clear that the Circuit Court's basis for dismissal was the Appellant's failure to timely file his action, and not his failure to name a suable entity or that the MCI was not an employer as defined by MHRA.

"This Court is primarily concerned with the trial court reaching the right result as opposed to the route taken by the trial court to reach that result. Therefore, we will affirm the judgment under any tenable theory regardless of whether the trial court advances wrong or insufficient reasons." *Ozark Appraisal Serv. v. Neale,* 67 S.W.3d 759, 764 (Mo. App. S.D. 2002) (internal citations omitted). "We of course will affirm the judgment if we conclude that it is correct, even though our reasons are not the same as those which seemed persuasive to the court below." *M.H. Siegfried Real Estate v. Independence,* 649 S.W.2d 893, 895 (Mo. 1983).

The petition only alleges claims against the Municipal Correction Institute. Summons was only issued against the Municipal Correction Institute. As such Appellant sued and served both a non-entity and an entity that does not fit the definition of an employer under MHRA, RSMo 213.010.

In this case, even though the Circuit Court did not rule on the issues of whether Appellant filed suit against a nonsuable entity under *Jordan v. City of Kansas City, Mo.*, 929 S.W.2d 882, 888 (Mo. App. W.D. 1996) or that the entity named is not an employer as defined by the MHRA under RSMo § 213.010. This Court may affirm the dismissal of this action based on either theory.

D. THE CITY OF KANSAS CITY IS AN EMPLOYER UNDER THE MISSOURI HUMAN RIGHTS ACT

The City's status as an employer as defined by the MHRA is not contested by Respondent**,** nor has it ever been. This further supports the Respondent's position that the Courts below did not dismiss the Appellant's case based on this theory.

5. CONCLUSION

Appellant's brief on the issues of whether the Respondent is a non-suable entity or an employer as defined by the MHRA were not the basis for dismissal. Additionally these issues were not included in the application for transfer filed with this Court. As such, these issues are not properly before this Court and should not be considered. Instead this Court should uphold the Circuit Court and Court of Appeals decisions that the Appellant's case should be dismissed based on limitations, further discussed in Point II, *infra*.

II. IN RESPONSE TO APPELLANT'S POINT II, THE CIRCUIT COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S CASE BASED ON LIMITATIONS IN THAT APPELLANT FAILED TO COMPLY WITH THE NINETY DAY FILING PERIOD UNDER THE MISSOURI HUMAN RIGHTS ACT.

A. INTRODUCTION

The Circuit Court properly dismissed Appellant's action based on limitations and this Court should affirm. Appellant attempts to avoid the judgment below by raising both old and new arguments. Before addressing the merits, Respondent notes at page 24 of his Brief, Appellant asserts that he received the March 21, 2000 MCHR "right to sue letter" on March 23, 2000 and cites the record at L.F. 0086. The reference cited is the MCHR letter only and provides no indication when it was received. As such, Hammond has violated Rule 84.04(c), because his statement of facts are not "fair and concise." as it contains factual matters that were not included in the record on appeal. Respondent also notes that at page 24 of his brief, Appellant incorrectly asserts that Respondent has waived Appellant's premature filing of his action. Again, there is no citation to the record to support this assertion.

With the exception of the main issue on appeal, Section D, Respondent will address each of the Appellant's arguments as they appear in Appellant's brief.

D. THE NINETY DAY LIMITATION PERIOD COMMENCES FROM DATE OF THE NOTICE

Appellant believes that the Title VII calculation for the running of the ninety day period controls actions based on the MHRA. Appellant is mistaken. Appellant overlooks the fact that his case was brought pursuant to the MHRA, not Title VII. Under Title VII, "A litigant has ninety days from the receipt of the EEOC letter in which to start an action, 42 U.S.C. 2000e-5(f)(1)." *Brooks v. Ferguson-Florissant Sch. Dist.,* 113 F.3d 103, 904 (8th Cir. 1997). The MHRA states

"Any action brought in court . . . shall be filed . . . within ninety days from the date of the commission's notification letter". Section 213.111. The Court in *Conway v. Central County Emergency 911,* 1996 U.S. Dist. LEXIS 18931; 72 Fair Empl. Prac. Cas. (BNA) 322, observed and held as follows, "The plaintiff was issued a notice of right to sue from the Missouri Commission on Human Rights on May 16, 1995. Plaintiff filed her complaint in this Court 156 days later on October 19, 1995. Under the MHRA, plaintiff must have filed suit within **ninety days from the date of the commission's notification letter**. RSMo §§ 213.111. Thus, plaintiff's sex and national origin discrimination claims based on the MHRA will be dismissed because they are time barred." Lexis cite at Page 3. (Emphasis added). The MHRA filing provision does not state "from the date of receipt of the letter." It is clear that the ninety day period under Title VII begins upon the receipt of notice, while MHRA is based on the date of the notice.

Appellant's action is based on the MHRA, not Title VII. As such, the MHRA filing deadlines apply, and not those found in VII.

The language of MHRA does not follow exactly the language of Title VII. Differences include that the limitations period for filing the administrative charge of discrimination with either the Commission and/or EEOC is 300 days under Title VII, 42 U.S.C. § 2000e-5(e)(1), and 180 days under the MHRA, RSMo § 213.075.1. A second major difference is that under Title VII, 42 U.S.C. 2000e-5, there is no limitation that runs from the date of the incident to the filing of a court action, while under MHRA, RSMo § 213.111., there is a two year limitation period. Under Title VII there is a statutory damage cap of $300,000.00, 42 U.S.C. § 1981a(b)(3)(D),while under the MHRA, there is no cap. Finally, with regard to the time limits for filing a court action, Title VII is based on the date of receipt 42 U.S.C. 2000e-5(f)(1). *Brooks v. Ferguson-Florissant Sch. Dist.,* 113 F.3d 103, 904 (8th Cir. 1997), while the MHRA is based on the date of the notice, RSMo § 213.111.

For Appellant to argue that the two Acts are the same and the MHRA ninety day rule should be the same as Title VII is simply wrong.

1. The MHRA is Coextensive with Title VII Law

The MHRA is coextensive with Title VII in that both address discrimination in the work place. Respondent agrees that Missouri Courts have adopted federal Title VII case law when interpreting analogous discrimination statutes in the Missouri Human Rights Act. *Swyers v. Thermal Sci., Inc.,* 887 S.W.2d 655, 656 (Mo. App. 1994). However, the Missouri Human Rights Act is not merely a reiteration of Title VII. The Act is in some ways broader than Title VII, and in other ways is more restrictive. If the wording in the Missouri Human Rights Act is clear and unambiguous, then federal

case law which is contrary to the plain meaning of the MHRA is not binding. *See Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622 (Mo. banc 1995).

As noted above, there are several stark differences between the two provisions. The mere fact that the Acts are "coexistive" does mean that the MHRA's clear mandate that the ninety days runs from the date of the notice should be ignored by Appellant. The Appellant also ignores the fact that while Title VII was passed by Congress in 1964, the ninety day provision of the MHRA was enacted in 1986. Since Title VII came first, it can be presumed that the Missouri Legislature was aware of the language of Title VII when it enacted the MHRA. Moreover, this Court can presume that the Missouri Legislature intended a different result when it enacted different language. Had the Missouri Legislature intended that a case be filed within ninety day of the receipt of the notice, it would have enacted the same language as that found in Title VII. Instead, the Missouri Legislature enacted language based on a date certain, that is stated on the notice, rather than an uncertain, and to some extent an unprovable date. The clear intent of the Missouri Legislature should not be usurped by this Court. This Court should interpret the MHRA consistent with its clear language.

There are several cases cited by Appellant for the proposition that MHRA provides that "suit must be filed within ninety days of *receipt* of a Right to Sue letter." In those cases, the issue before the Court was not the timeliness of the filing of the action. As such, the statements concerning the date of receipt of the notice are dicta.

Appellant cites this Court's denial of a writ of prohibition brought on this very same issue in the matter of *State of Missouri ex. rel. Jeremiah W. Nixon v. Brown,* No. SC85133. The Trial Court in *Brown* has since dismissed Appellant's action based on the Court of Appeal's decision in this case. (Respondent's Addendum, pages A-1 to A-6). There are at least two cases in which courts have held that the notice date controls the running of the ninety filing period.

2. Statutory Construction Favors The Filing Deadline Commencing From the Date of the Notice and Not it's Receipt

Appellant wants this Court to find the following provision ambiguous:

> **If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice...the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the**

person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint. If, after the filing of a complaint... as it relates to housing, and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. *Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter* to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party." RSMo § 213.111.1.

"But, because statutes are meant to be read and understood in their entirety, the language of the last sentence in section 213.111.1 is important: Any action brought in court under [the Missouri Human Rights Act] shall be filed within ninety

days from the date of the commission's notification letter to the individual.... The last sentence thus clarifies the potential confusion created in earlier parts of the text.

"It might be a better idea to provide for a period of ninety days from receipt of the notice (letter), because of the conflict with EEOC practice. However, we cannot do that without re-writing the statute ourselves, something for which we have no authority." ***Hammond v. Municipal Correction Institute*****, 2003 Mo. App. LEXIS 451, at pages 20-21.**

As the Court of Appeals in ***Hammond*** **noted, "Although the practitioner must carefully read the statute concerning the deadline for filing, the statute is sufficiently clear to avoid due process problems. Also, the ninety day requirement would be no surprise to a layperson, because that specific language was included twice in the letter to sue. The first sentence bolded and underlined the ninety day limitation.**

The second sentence appeared as follows:

You are hereby notified of your right to sue the Respondent(s) named in your complaint in state circuit court. THIS MUST BE DONE WITHIN 90 DAYS OF THE DATE OF THIS NOTICE OR YOUR RIGHT TO SUE IS LOST. (emphasis in original)." ***Hammond*** **at page 21.**

The statute is clear that the ninety day time frame to file an action in Circuit Court commences on the date of the notice. Therefore, this Court need look no further than the plain language of the statute and that language dictates that a case

filed ninety-one days after the date of the notice is untimely.

3. The Three Day Mailing Rule Was Not Raised Below and Waived on Appeal

The argument concerning the mailing three day rule (Supreme Court Rule 44.01) was not raised in the Circuit Court. "[P]laintiff failed to plead these contentions or present them to the trial court for judgment. Plaintiff raises the arguments for the first time in her brief on appeal, and they are not properly preserved for our review." ***Johnston v. Norrell Health Care, Inc.*****, 835 S.W.2d 565, 568 fn. 3 (Mo. App. E.D. 1992). However, even if it had been properly preserved, the argument would fail. Rule 44.01(e) states:**

> **Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice is served by mail, three days shall be added to the prescribed period.**

Rule 41.01(a) states:

> **Rules 41 through 101 shall govern the following:**
>
> **(1) Civil actions** ***pending*** **in this Court and court of appeals;**
>
> **(2) Civil actions** ***pending*** **before a circuit judge except those actions governed by the probate code.**
>
> **(3) Civil actions** ***pending*** **before an associate circuit judge sitting as a circuit judge. (emphasis added).**

Rule 44.01 applies only to suits already filed and pending in a court, not to notices

of the right-to-sue. The Rules of Civil Procedure, Rules 41 through 101, by their terms do not apply to proceedings in administrative agencies. *AT&T Info. Sys., Inc. v. Wallemann*, 827 S.W.2d 217, 221 (Mo. App. 1992).

Missouri courts have ruled on a similar case. In *State ex rel. Director of Revenue, State of Missouri v. Rauch*, 971 S.W.2d 350 (Mo. App. 1998), the Department of Revenue suspended the license of Carolyn Stoneman after she was arrested for driving while intoxicated. *Id.* at 351. Stoneman filed a petition to review the decision of the administrative agency in the Circuit Court of Charles County. *Id.* at 352. Section 302.311, RSMo, provided that:

> **In the event an application for a license is denied or withheld, or in the event that a license is suspended or revoked by the director, the applicant or licensee so aggrieved may appeal to the circuit court of the county of his residence...for the review of administrative decisions at any time within thirty days after notice that a license is denied or withheld or that a license is suspended or revoked.**
>
> **The thirty day period ran from the date of hand delivery or mailing of the notice. § 536.110.2, RSMo.**

Stoneman's petition for review was filed more than thirty days after the notice was mailed, but within thirty-three days. *Rauch*, 971 S.W.2d at 353. Stoneman argued that three days should be added for mailing pursuant to Rule 44.01. *Id.* The court held that Rule 44.01 has no application to notice from an administrative agency concerning a right to file a petition. *Id.*

In this case, Rule 44.01 does not apply to a right-to-sue letter from the MCHR. The statute of limitations begins to run when the letter is issued:

> **Any action brought in court under [the Missouri Human Rights Act] shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party. § 213.111.**

By the terms of the statute, there is no provision made for time the notice spends in the mail. Appellant's untimely filed action is not saved by Rule 44.01.

B. APPELLANT DID NOT PREMATURELY FILE HIS PETITION

The discussion in Appellant's brief at pages 26 through 27 about his premature filing of this case ignores the plain language of the MHRA that states, "[a]ny action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual . . ." RSMo 213.111. Clearly any action brought in court must comply with this filing deadline. Respondent moved and the Circuit Court ruled that Appellant filed his court action after the ninety day limitations period.

1. In multiple right to sue situations, Appellant may not rely on the last right to sue noticed where the issues are not reasonably related

Appellant mistakenly believes that the ninety day time period can be extended based on the filing of additional charges of discrimination and waiting until other notices of right to sue are issued. Appellant has cited no case law from

either Missouri or the Eighth Circuit to support this novel approach to avoid the ninety day filing deadline set forth in the MHRA. Appellant instead believes that the Ninth Circuit case of *Brown v. Continental Com Co.*, 765 F.2d 810 (9th Cir. 1985) saves his untimely filed action: In *Brown*, the issue was if two related charges of discrimination were filed, could the plaintiff rely on the second right to sue notice or could claims based on both charges be dismissed because plaintiff did not sue within ninety days of the first notice. The Ninth Circuit held that the plaintiff could maintain an action based on the second charge and notice so long as the underlying incidents are not time barred.

In this case, Appellant only sought to sue based on his claim of disability discrimination, and not race or age. However, he attempts to use right to sue notices from race and age charges to save his untimely disability claim. This cannot be considered "reasonably related." To so hold would effectively allow any plaintiff to sue based on the date of the last right to sue notice, no matter how unrelated, because all would be related to employment. The Court should not open those floodgates. Thus any reliance by Appellant on the other right to sue notices for those claims is misplaced.

2. The Court Of Appeals Correctly Concluded That The Other Right To Sue Notices Did Not Save His Untimely Action.

The only right to sue notice attached to the petition and the amended petition related to the allegations in the petition was from the MCHR and dated ninety-one days prior to bringing the action. (L.F. 81 and 86; L.F. 92 and 97). The EEOC

Right to Sue Notice attached to the amended petition is irrelevant because no federal Title VII violations were alleged in either petition. (L.F. 81-86, 92-97). As such, the Circuit and Appellate Courts correctly concluded that the only relevant right to sue notice was from the MCHR attached to the original and amended petitions.

Even if this Court were to consider the other charges filed by Appellant, the Appellant's action should not survive. Appellant's motion to amend (L.F. 0044-45), was filed contemporaneously with his suggestions in opposition to the motion to dismiss. (L.F. 0051-61). The motion to amend petition had attached a proposed second amended petition. (L.F. 0046-50). The proposed second amended petition contained the same allegations as the earlier filed petitions and no notices were attached. (L.F. 0046-50). The only change from the amended petition is that proposed second amended petition named as defendant the City of Kansas City, Missouri. (L.F. 0046 caption and L.F. 0050 prayer for relief). Appellant's suggestions in opposition to the motion to dismiss did not attach any additional notices from the MCHR and had one inapplicable notice from the EEOC. (L.F. 0051-0061).

It was not until after the Circuit Court granted the motion to dismiss that Appellant tried to use unrelated charges that were attached to Appellant's Motion **to Reconsider. (L.F. 0020-32).** All of the EEOC notices are irrelevant as there are no Title VII claims. This leaves the "three" MCHR notices. The March 21, 2000 only notice attached to the original and amended petitions. As to the August 31, 2000 notice, Appellant states on page 28, at footnote 3 of his brief, "There is confusion as to whether an August 31, 2000 right

to sue from the MHRC exists as well as one from the EEOC." There is no confusion because there is no August 31, 2000 notice from the Commission in the record, but there is a notice bearing that date from the EEOC. **As the Court of Appeals observed, "This court does not know whether an August 31, 2000 letter from the MCHR exists, or if Hammond has mistakenly assumed the EEOC letter was an MCHR letter. What is clear from the record is that there is no evidence that the trial court was presented with any right-to-sue letter from the MCHR dated after the March 21, 2000 letter."** ***Hammond*** **at page 11. Finally, there is an argument made by Appellant concerning a MCHR notice issued in February 22, 2001. Appellant waived any argument concerning the February 22, 2001 notice because it was not included in his suggestions in opposition to the motion to dismiss or motion to amend, and therefore not presented to the Circuit Court prior to its ruling on the motion to dismiss.**

The Courts below correctly concluded that the other notices did not save Appellant's untimely filed action.

3. Appellate Court Correctly Concluded That The Ninety Day Filing Deadline is a Statute Of Limitation That Should Be Strictly Construed.

The Court of Appeals correctly depicts the ninety day filing deadline as both a condition precedent and a statute of limitation when it is not met by Appellant. In its opinion, the Court of Appeals stated, "Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself within an exception enacted by the legislature. Statutes of limitation may be suspended or

tolled only by specific disabilities or exceptions enacted by the legislature and the courts cannot extend those exceptions. [citations omitted]". *Hammond* at page 20. The Court of Appeals correctly held that when a condition precedent such as filing the action within ninety days of the notice is not met, the action is subject to dismissal. Statutes of limitations as precedent to suit is well settled law, and cannot seriously be challenged by the Appellant.

Appellant believes that the receipt of a right to sue letter is not a jurisdictional prerequisite to suit under the MHRA. The issue is not jurisdiction - the issue is limitations. Under Missouri Law, statutes of limitations for claims brought under the MHRA are strictly construed. *Hill v. John Chezik Imports,* 797 S.W.2d 528, 530 (Mo. App. E.D. 1990). Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself within an exception enacted by the legislature. *Langendoerfer v. Hazel,* 601 S.W.2d 290 (Mo. App. E.D. 1980). Strict compliance is required with regard to specific statutory exceptions. *Neal v. Laclede Gas Company,* 517 S.W.2d 716, 719 (Mo. App. 1974). Statutes of limitation may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions. *Id.* Failure to meet these deadlines bars the claim. *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 228 (8th Cir. 1996). The Appellant at no time presented evidence or argued that he fit an exception or that the ninety time limit should be tolled.

C. THE DOCTRINES OF CONTINUING VIOLATION AND RELATION BACK WERE NOT RAISED IN THE CIRCUIT COURT AND THEREFORE WERE

WAIVED BY APPELLANT AND EVEN IF PRESERVED WOULD NOT SAVE HIS UNTIMELY FILED ACTION

Appellant did not raise the "continuing violation" argument in his suggestions in opposition to motion to dismiss (L.F. 0051-61) in the Circuit Court and has raised it for the first time on appeal. Accordingly, Appellant has failed to preserve the continuing violation argument for review by this Court. *Johnston v. Norrell Health Care, Inc. supra*.

Even if the continuing violation theory was properly raised in the Circuit Court, it would relate to the timeliness of the filing of the charge with the administrative agency, not the timeliness of the filing of the petition with the Circuit Court.

"Missouri courts have recognized the concept of continuing violations in employment discrimination cases. In order to establish discrimination in the context of continuing violations, a plaintiff must show that a continual employment relationship existed during the time of the alleged discriminatory acts. Once the employment relationship is severed, the discrimination ceases." *Hill v. St. Louis Univ.*, 923 F. Supp. 1199, 1205 (E.D. Mo. 1996) (internal citations omitted). The *Hill* court, citing *Sitz v. I.I.T. Financial Corp.*, 619 F.2d 738, 744 (8th Cir. 1980), went on to hold, "Where . . . discrimination is not limited to isolated incidents but pervades a series or pattern of events which continue to within [180] days of the filing of the charge . . . the filing is timely . . . regardless of when the first discriminatory incident occurred."

In this case, even if the continuing violation theory had been raised below, Appellant would still not prevail as the case was dismissed because he waited too long to file his action in Circuit Court and not that he waited too long to file his charge of discrimination with the Commission. Further, the Commission's notice attached to both the original and first amended petitions clearly show that Appellant filed his charge of discrimination on September 20, 1999 (L.F. 0097 and L.F. 0086), which is after he was terminated on September 16, 1999 (L.F. 0081, at par. 5). As such, the employment relationship ceased and any and all claims should have been included in this charge of discrimination or others filed prior to that date. The continuing violation theory does not save Appellant's untimely filed action.

CONCLUSION

On March 21, 2000, the Missouri Commission on Human Rights issued to Appellant a notice of right to sue. Under the Missouri Human Rights Act, and as set forth in the notice, Appellant had ninety days, from March 21, 2000 until June 19, 2000, to file his court action. On June 20, 2000, ninety-one days after the Commission's notice was issued, Appellant filed his action. Appellant acknowledged his action was filed ninety-one days after the notice was dated. (L.F. 20). The Circuit Court correctly ruled that Appellant's action was barred by limitations under RSMo §213.111.

For the foregoing reasons, Respondent Municipal Correction Institution respectfully requests that this Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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RESPONDENT'S CERTIFICATE OF COMPLIANCE

Douglas McMillan, attorney for Respondent, hereby certifies that he is in compliance with Rule 55.03, that this Brief is in compliance with the limitations contained in Rule 84.06(b), that Appellant's Brief contains 6,579 words that the Brief was prepared using WordPerfect 9.0 in 13 point font, and in Times New Roman. Pursuant to Rule 84.06(g), the accompanying disk has been scanned for viruses and it is virus-free.

_____
Douglas McMillan

CERTIFICATE OF SERVICE

Two copies of Respondents' Substitute Brief and diskette were served by hand delivery, this 22nd day of September, 2003, to:

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_____
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